Petition

81-1287

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ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

PETITIONER

VS.

FREDDIE LEE WRIGHT,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

I.

DOES THE DECISION OF THIS HONORABLE COURT IN BECK V. ALABAMA (447 U.S. 625 [1980])[1] REQUIRE THE AUTOMATIC RETRIAL OF ALL CASES TRIED UNDER THE ALABAMA CAPITAL PUNISHMENT STATUTE[2] PRIOR THERETO WITHOUT REGARD TO THE EVIDENCE?

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[1]On June 20, 1980, this Honorable Court held that the Alabama statute was unconstitutional because it contained a clause prohibiting the jury's consideration of lesser included offenses even where the evidence would support such a verdict. Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). On remandment the Alabama Supreme Court severed the preclusion clause and reconstrued the sentencing procedure under the statute. Beck v. State (S. Ct. Ala., 1980) 396 So. 2d 645.

[2]Title 13, Sections 13-11-1 through 13-11-9, Code of Alabama, 1975 (Appendix "C").

II.

IN CAPITAL CASES IS A PROCEDURE WHICH CREATES A SUBSTANTIAL POSSIBILITY OF ARBITRARY AND CAPRICIOUS VERDICTS CONTRARY TO THE EVIDENCE CONSTITUTIONALLY ACCEPTABLE, WHERE THERE ARE ALTERNATIVE PROCEDURES AVAILABLE WHICH AVOID SUCH POSSIBILITY?

PARTIES

In the Circuit Court of Mobile County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner herein and Freddie Lee Wright, Respondent herein.

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OPINIONS BELOW

The opinion or order of the Court of Criminal Appeals of Alabama is not as yet reported but will be reported as:

Wright v. State (Cr. App. Ala., 1981) ___ So. 2d ___.

The same is submitted herewith as Appendix "A," hereto.

The opinions and orders of the Supreme Court of Alabama are not as yet reported but will be reported as:

Ex parte: State, In Re: Wright v. State (S. Ct. Ala., 1981) ___ So. 2d ___.

The same are submitted herewith as Appendix "B."

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued December 11, 1981, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...."

STATUTORY PROVISIONS INVOLVED

Code of Alaama, 1975, Title 13, Sections 13-11-1 through 13-11-9, the same being voluminous are submitted as Appendix "C" hereto.

STATEMENT OF THE CASE

In order to understand the significance of the brief memoranda and orders of which the Petitioner State seeks review it is necessary to consider the context in which they were rendered.

I.

BACKGROUND

In response to Furman v. Georgia (408 U.S. 238, 33 L. Ed. 2d 346, 92 So. Ct. 2726 [1972]) the Alabama Legislature passed Act No. 213 of the 1975 Legislative Session, now codified as Title 13,

Sections 13-11-1, through 13-11-9, Code of Alabama, 1975 (Appendix "C"). Because it was thought required by Furman, the Legislature forbade juries from considering lesser included offenses.[3] That this preclusion of lesser included offenses in cases where the evidence would support them was unnecessary, become apparent in 1976.[4] Such preclusion was constitutionally mandated only in cases where there was no evidence to support a verdict for lesser included offenses.[5] Finally, in

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[3]"...and which [capital] offenses so charged with said aggravation shall not include any lesser offenses...." Title 13, Section 13-11-2(a), Code of Alabama, 1975 (Appendix "C").

[4]Gregg v. Georgia, 428 U.S. 153, 163, 49 L. Ed. 2d 859, 869, 96 S. Ct. 2909 (1976); Proffitt v. Florida (Note 16) 428 U.S. 242, 260, 49 L. Ed. 2d 913, 927, 96 S. Ct. 2960 (1976).

[5]Roberts v. Louisiana, 428 U.S. 325, 334, 49 L. Ed. 2d 974, 982, 96 S. Ct. 3001 (1976).

Beck v. Alabama (447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 [1980]) this Honorable Court held that the Preclusion Clause denied due process in those cases where there was evidence of lesser included offenses. On remand of the Beck case, the Alabama Supreme Court severed the Preclusion Clause and reformed the sentencing procedure which had also been criticized by this Honorable Court. Beck v. State (S. Ct. Ala., 1980) 396 So. 2d 645.

There were numerous cases which had been tried before the Beck decisions which were affected thereby. These cases fell into two catagories: Those in which there had been some evidence of lesser included offenses and those in which there had been none. With regard to the former, of which Beck itself was typical, there was never any doubt about the necessity of a retrial. On the other

hand, the latter, the cases in which there was no evidence of lesser included offenses, themselves fell into four catagories: (1) There were those where the State's evidence showed that the crime had been the capital offense and could not have been any other and no defense evidence was presented. (2) There were cases where the State's evidence proved the capital offense to the exclusion of all others and the defense presented evidence, such as an alibi, which, if believed would compel acquittal but would not reduce the degree of the crime in anywise. (3) There were convictions based on negotiated guilty pleas and (4) those based on non-negotiated guilty pleas.

In series of cases beginning with Ritter v. State ([S. Ct. Ala., 1981] 403 So. 2d 154) the Supreme Court of Alabama has held that with the possible exception of convictions based on negotiated

guilty pleas[6] all pre-Beck cases had to be retried without regard to the evidence nor anything else. This result was said to be compelled by this Court's decision in Beck.

II.

THE INSTANT CASE

The Respondent, Freddie Lee Wright, was indicted by the Grand Jury of Mobile County, Alabama, for Capital Robbery[7] and the murder in the first degree of two or more persons.[8] The plea was not guilty. (R. pp. 1-3)

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[6]See Graham v. State (Cr. App. Ala., 1980) 403 So. 2d 275; 281-283; cert. quash. 403 So. 2d 286.

[7]"Capital Robbery" is a robbery in which the victim is intentionally killed. See Title 13, Section 13-11-2(a) (2), Code of Alabama, 1975 (Appendix "C").

[8]Title 13, Section 13-11-2(a)(10), Code of Alabama, 1975 (Appendix "C").

The Respondent was convicted and sentenced to death. (R. pp. 23-25).

At no point at trial did the Respondent make any suggestion that his defense was in any way affected by the Preclusion Clause.

Appeal was taken to the Court of Criminal Appeals of Alabama, wherein the Respondent raised for the first time questions relating to the Preclusion Clause. The State's response was substantially identical to what is here presented: (1) Because of the lack of evidence relating to lesser included offenses, the point was moot and (2) to have allowed the jury to consider such offenses in this case would violate the principles enunciated by this Honorable

Court.[9] On August 4, 1981, the Court of Criminal Appeals of Alabama issued the following order:

> "The judgment of the conviction is reversed and the cause remanded for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), on remand, Ala., 396 So. 2d 645 (1981), and Ritter v. State, Ala. S. C. No. 77-798 (Ms. May 8, 1981),[10] Ala. Cr. App., 1 Div. 837 (Ms. June 23, 1981). July 7, 1981, Motion for Stay of Mandate Denied by Ala. S. C.
>
> "REVERSED AND REMANDED." (Wright v. State (Cr. App. Ala., 1981) ___ So. 2d ___ [Appendix "A"])

The State of Alabama presented the questions herein raised to the Supreme

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[9]E.g. Roberts v. Louisiana, 428 U.S. 325, 334, 49 L. Ed. 2d 974, 982, 96 S. Ct. 3001 (1976).

It should be noted that the briefs were filed in the Court of Criminal Appeals long before the decision in Beck v. Alabama, supra.

[10]Ritter v. State, (S. C. Ala., 1981) 403 So. 2d 154.

Court of Alabama by a petition for a writ of certiorari. On December 11, 1981, the Supreme Court of Alabama, with three Justices dissenting, issued the following order:

> "Writ Denied." (Wright v. State [S. Ct. Ala., 1981] ___ So. 2d_[Appendix "B"].)

STATEMENT OF THE FACTS

Rather than burden this Honorable Court with a detailed recitation of the facts, the Petitioner will set out the facts here very briefly. If this Honorable Court should wish a more detailed recitation such is submitted as Appendix "D," the same being the detailed statement of the facts with record citations which was presented to the Supreme Court of Alabama.

The evidence showed the following:

1. The following facts were shown without conflict by affirmative evidence:

On December 1, 1977, between eleven o'clock and noon, some person or persons, hereinafter referred to as "the Perpetrators," entered the Western Auto Store in Mt. Vernon, Mobile County, Alabama. The Perpetrators tied up the owners and operators of the store, Mr. and Mrs. Warren Green, back to back in a storage room of the store. The Perpetrators stole Mr. Green's watch and money and merchandise from the store. Before leaving the store the Perpetrators or some or one of them shot Mr. and Mrs. Green each in the head while they were tied up begging for their lives. As a result of said gun shot wounds both Mr. and Mrs. Green died. (R. pp. 115-123, 130-134, 138-140, 143, 147-154 and 254-256).

2. In addition to the above, the State's evidence showed the following:

On December 1, 1977, four men Rodger McQueen, Reginald Tinsley (alias Gill

Man), Percy Craig and the Respondent were driving from Mobile to Jackson, Alabama, for the purpose of committing robberies. They arrived at the Western Auto Store in Mt. Vernon at about noon. Rodger McQueen went into the store to make a purchase. While McQueen was still inside, the Respondent entered the store with a gun and forced Mr. and Mrs. Green into the back room and tied them up. McQueen, Tinsley and the Respondent removed money and merchandise from the store. The Repsondent and Tinsley then made one last trip into the store after the others were in the car, and shot Mr. and Mrs. Green. (R. pp. 165-171, 178-198, 208-219 and 225)

3. The defense was alibi, and evidence was presented tending to show that the Respondent was at the Ebony Club in Mobile at the time of the robber-murders. (R. pp. 295-309)

SUMMARY OF THE ARGUMENT

1. The Supreme Court and Court of Criminal Appeals of Alabama have held in this case and others that all pre-Beck cases must be re-tried regardless of the impact or lack of impact of the Preclusion Clause struck down in Beck v. Alabama (447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 [1980]) See Ritter v. State (S. Ct. Ala., 1981) 403 So. 2d 154 and (S. Ct. Ala., Dec. 11, 1981) ___ So. 2d ___, and Bracewell v. State (S. Ct. Ala., June 19, 1981) (unreported) and (S. Ct. Ala., 1981) 401 So. 2d 130. Nothing in this Court's decision nor opinion in Beck v. Alabama (supra) suggests such a result. Therefore, the opinions and decisions of the Alabama appellate courts in this case conflict with this Court's decision in Beck v. Alabama (supra).

2. Remanding this cause for an entirely new trial creates the risk of an

arbitrary and capricious verdict such as was condemned in Furman v. Georgia (408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 [1972]) and Roberts v. Louisiana (428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 [1976]). Such risk is unnecessary because, even if the Respondent's case was in some theoretical way affected by the Preclusion Clause, there is a procedure, remandment, by which his rights can be fully protected without the unconstitutional risk. See Pate v. State ([S. Ct. Ala., May 8, 1981] ___ So. 2d ___). Therefore the decisions of the State appellate courts in this case conflict with both Furman (supra) and Roberts (supra).

ARGUMENT

I.

THIS COURT'S DECISION IN BECK DOES NOT MANDATE THE RUBBER STAMP REVERSAL OF EVERY CASE TRIED UNDER THE STATUTE PRIOR THERETO REASON FOR GRANTING THE WRIT: CONFLICT WITH BECK V. ALABAMA (447 U.S. 625 [1980])

It would, of course, be presumptious of the Petitioner to try to tell this Honorable Court what it intended by the Beck decision, but a brief examination of that case is necessary to contrast the subsequent holdings of the Alabama Courts.

In Beck v. Alabama (447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 [1980]) this Honorable Court considered the conviction and death sentence of a convict convicted and sentenced under a statute forbidding the consideration of lesser included offenses. In Beck it was clear and conceded that the evidence would have supported a finding of lesser included

offenses. In summarizing the issue before it and its decision, this Honorable Court wrote:

> "...We granted certiorari to decide the following question:
>
> "'May a sentence of death constitutionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?' 444 U.S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204
>
> "We now hold that the death penalty may not be imposed under these circumstances...." (447 U.S. 625, 627, 65 L. Ed. 2d 392, 396).

Thus, Beck was carefully limited to its facts. In fact, this Honorable Court even expressly declined to extend the Beck rule to non-capital cases. See Note 14, 447 U.S. 625, 638, 65 L. Ed. 2d 392, 403.

Now, let us see how the Alabama courts have applied the Beck rule to

cases in which there is no evidence of lesser included offenses.

In Ritter v. State ([S. Ct. Ala., 1981] 403 So. 2d 154) the Alabama Supreme Court reversed, on authority of Beck v. Alabama,[11] supra, the conviction of a defendant who had pleaded guilty to the capital offense, frankly admitted his guilt and demanded the death penalty. In denying rehearing in Ritter, the Court wrote:

11"...SHORES, JUSTICE.

"Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19, 1980], 396 So. 2d 645 (Ala. 1980).

"REVERSED AND REMANDED."

"...We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F. 2d 221 [March 19, 1981] (1981)[12], which involved Ritter's partner in this crime...." (Emphasis supplied).

Ritter established a pattern for all the pre-Beck cases. Retrial was seen as required by this Honorable Court's decision and opinion in Beck. See, for example, Bracewell v. State (S. Ct. Ala.,

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[12]Pending in this Honorable Court on writ of certiorari sub. nom. Hopper v. Evans 80-1714, certiorari granted June 22, 1981, sub. nom. Britton v. Evans 49 U.S.L.Wk. 3954.

1981) 401 So. 2d 130.[13] The orders in these cases result solely from the Alabama Supreme Court's understanding of Beck v. Alabama (supra) and nothing else. If there was every any doubt about this, it was dispelled when this Honorable

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[13]Initially, the writ was denied on June 19, 1981, with a brief memorandum by Justice Maddox, which read:

"Petition for Writ of Certiorari is denied.

"By denying the writ of certiorari in this case, we assume that the Court of Criminal Appeals, after reviewing the record in this case, has determined that there was some evidence presented which would have entitled the accused to an instruction on a lesser included offense.

"Writ denied." (Unreported manuscript opinion) (Emphasis supplied).

However, six (6) days later Justice Maddox's opinion was withdrawn on the Court's own motion, and the following was issued:

"The opinion dated June 19, 1981, is withdrawn and the following, together with Justice Maddox's special concurring opinion, is substituted in its place.

"WRIT DENIED." (Bracewell v. State [S. Ct. Ala., 1981] 401 So. 2d 130)

Court vacated and remanded the Ritter case for reconsideration of an alternative basis for these orders. Alabama v. Ritter 50 U.S.L. Wk. 3277 (Oct. 13, 1981). On December, 11, 1981, the Alabama Supreme Court wrote:

> "The United States Supreme Court has remanded this case to this Court for further consideration in light of Reed v. State, Ala., [MS. June 12, 1981] ___ So. 2d ___ (1981), extended on rehearing (August 28, 1981), motion for clarification denied (October 7, 1981).
>
> "On June 12, 1981, this Court extended its initial opinion in the present case to explain that our reversal and remand was compelled by the decision of the United States Supreme Court in Beck v. Alabama, [447] U.S. [625], 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, Ala., 396 So. 2d 645 (1980), and was "consistent with the interpretation of that decision" reached by the Fifth Circuit in Evans v. Britton, [639] F. 2d [221] [March 19, 1981] (1981). We adopt our previous opinion and now unequivocally hold that our previous opinion in this case was based upon federal constitu-

> tional grounds, not state law grounds. Moreover, our opinion in Reed v. State, supra, rather than altering our previous decision in this case explained further why we felt compelled by federal constitutional considerations to reverse the conviction in this case." (Ritter v. State [S. Ct. Ala., Dec. 11, 1981] ___ So. 2d ___) (Emphasis supplied).

The question here is not whether or not retrying all these cases is a good idea[14] but whether this Honorable Court's decision in Beck mandates retrial in every case without regard to the evidence. The Alabama statute before the severence of the Preclusion Clause required that juries choose between guilt of the capital offense or absolute acquittal, even when the evidence suggested a middle verdict. However, had

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[14]In the next section the Petitioner will point out that it is in fact a bad idea.

the Preclusion Clause never existed, this case would still have presented the Respondent's jury with the same choice. The evidence in this case admitted only two possibilities: Either (1) The Appellant was at the Western Auto Store in Mt. Vernon at noon on December 1, 1977, robbing the store and brutally murdering the two helpless victims in cold blood or (2) The Appellant was at a Club in Mobile behaving himself on that day and at that time.

Thus, the possibility of a verdict of guilty of a lesser included offense was precluded by the evidence and the constitutional prohibition against arbitrary and capricious verdicts. In other words, the Preclusion Clause had no impact whatever on this case.

Nothing in this Honorable Court's opinion in Beck suggests a mandate for rubber stamp reversals of cases which

could not have been affected in any way by the Preclusion Clause. In holding that it did, the Court of Criminal Appeals and Supreme Court of Alabama's decisions and opinions in this case are in conflict with Beck v. Alabama, supra.

II.

REVERSING THIS CASE FOR AN ENTIRELY NEW TRIAL CREATES THE UNCONSTITUTIONAL RISK OF AN ARBITRARY AND CAPRICIOUS VERDICT.

REASON FOR GRANTING THE WRIT CONFLICT WITH FURMAN V. GEORGIA (408 U.S. 238 [1972]) AND ROBERTS V. LOUISIANA (428 U.S. 325 [1976])

The decision in Beck v. Alabama (447 U.S. 625, 65 L. Ed. 2d 392 100 S. Ct. 2382 [1980]) allowed the Alabama Supreme Court to formulate its own constitutionally acceptable remedy for the problems of the invalidated Preclusion Clause. The question here is whether the rubber stamp granting of new trials in cases like the instant one is constitutionally acceptable.

In Furman v. Georgia (408 U.S. 238, 33 L. Ed. 2d 346, 92 So. Ct. 2726 [1972]) this Honorable Court condemned the then existing statutory schemes which allowed juries and judges to mead out the death penalty on the basis of sympathy and prejudice rather than the evidence and the law. It is important to recall that Furman's condemnation was not limited to instances in which sentences were actually the result of prejudice or sympathy but was directed against the mere possibility. This policy was reitinerated in Roberts v. Louisiana (428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 [1976]) wherein this Honorable Court struck down a Louisiana statute which provided for a mandatory death penalty but required the jury to consider lesser included offenses regardless of the evidence. On this latter, particularly relevant point, this Honorable Court

wrote:

> "...Louisiana's mandatory death sentence statute also fails to comply with Furman's [Furman v. Georgia (supra)] requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences...Under the current Louisiana system...every jury in a first degree murder case is instructed on the crimes of second degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts...." (428 U.S. 325, 334, 49 L. Ed. 2d 974, 982)

The Alabama Appellate Courts have, on authority of Beck v. Alabama, supra, ordered a new trial in this case. Now, reversing cases like the instant case on authority of Beck v. Alabama, a case concerned primarily with the question of lesser included offenses, creates the very real possibility, no, probability, that on retrial the jury will be permitted to consider less included offenses even if the evidence is a carbon

copy of that at the first trial. This creates the possibility of arbitrary and capircious verdicts contrary to the evidence. Procedures which needlessly create such possibilities were, as pointed out above, condemned in Furman v. Georgia, supra, and again in Roberts v. Louisiana, supra. The risk of arbitrary and capricious verdicts is needless in cases like the instant one because there is available an alternative procedure which avoids the risk while guaranteeing the accused full protection from even any theoretical adverse effects of the Preclusion Clause.

This alternative to an automatic new trial is a hearing in the trial court on the issue of the affect of the Preclusion Clause on the original trial. There is recent precedent for such a hearing in the alternative to a new trial. In Pate v. State ([S. Ct. Ala., May 8, 1981] ___

So. 2d ___) the Alabama Supreme Court found that the trial court erred in not reviewing pre-trial witness statements but did not order a new trial unless it appeared that the error had affected the original trial. In Pate the cause was remanded to the trial court for such determination. Thus, even if the Respondent should claim, as he has yet to do, that the Preclusion Clause did inhibit his defense in some specific way, the matter can be examined without a whole new trial. Since the remandment procedure is available to completely protect the Respondent while avoiding the possibility of an arbitrary verdict, it must, under the decisions of this Honorable Court be pursued rather than the rubber stamp granting of a new trial. In ruling to the contrary, the Alabama Appellate Courts ruled contrary to the prior decisions of this Honorable Court.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision and opinions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama and on such review will reverse the decisions of said Courts granting a new trial to the Respondent.

/s/
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/s/
EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL

/s/
JOSEPH G. L. MARSTON, III
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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, and Assistant Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this 7th day of January, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Freddie Lee Wright, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

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Appendix

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UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

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FREDDIE LEE WRIGHT,

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
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APPENDIX A

AUG. 4 1981

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

1 Div. 86

Freddie Lee Wright

v.

State

Appeal from Mobile Circuit Court

HARRIS, PRESIDING JUDGE

The Judgment of the conviction is reversed and the cause remanded for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), on remand, Ala., 396 So. 2d 645 (1981), and Ritter v. State, Ala. S. C. No. 77-798 (Ms. May 8, 1981)[1],

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[1]Ritter v. State (S. Ct. Ala., 1981) 403 So. 2d 154; vacated, sub. nom. Alabama v. Ritter, 50 U.S. L. Wk. 3277; op. ext. (S. Ct. Ala., Dec. 11, 1981) ___ So. 2d ___.

Ala. Cr. App., 1 Div. 837 (Ms. June 23, 1981). July 7, 1981, Motion for State of Mandate Denied by Ala. S.C.

REVERSED AND REMANDED.

All the Judges concur.

APPENDIX B

DEC 11 1981

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Freddie Lee Wright

81-60 v.

State of Alabama)

EMBRY, JUSTICE.

WRIT DENIED.

Torbert, C. J., and Almon, Shores and Beatty, JJ., concur.

Maddox, Jones and Adams, JJ. dissent.

Faulkner, J., not sitting.

81-60 - Ex parte State (Re: Wright v. State)

JONES, JUSTICE (Dissenting).

I respectfully dissent. I would grant the writ. See my dissent in Ex parte State (Re: Bryars v. State), [MS. Dec. 11, 1981] ___ So. 2d ___ (Ala. 1981).

Maddox and Adams, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 11 day of Dec. 1981

J. O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX C

CODE OF ALABAMA,

1975,

TITLE 13,

CHAPTER 11

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, herein, neither a court nor a jury shall fix the punishment for the commission of treason, felony, or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases were no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed

as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1).

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the Defendant guilty, they shall fix the punishment at death when the Defendant is charged by indictment with any of the following offenses and with aggravation which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant.

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant.

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant.

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant.

(5) The murder of any police officer, sheriff, deputy, state trooper, or peace officer of any kind, or prison or jail guard, while such prison or jail guard is on duty, or because of some official or job-related act or performance of such officer or guard.

(6) Any murder committed while the Defendant is under sentence of life imprisonment.

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire.

(8) Indecent molestation, or an attempt to indecently molest a child under the age of 16 years, when the child victim is intentionally killed by the defendant.

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by sections 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion.

(10) Murder in the first degree wherein two or more human beings are in-

tentionally killed by the defendant by one or a series of acts.

(11) Murder in the first degree where the victim is a public official or public figure, and the murder stems from or is caused by or related to his official position, acts, or capacity.

(12) Murder in the first degree committed while Defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.

(13) Any murder committed by a Defendant who has been convicted of murder in the first or second degree in

the twenty years preceding the crime.

(14) Murder when perpetrated against any witness subpoened to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the Defendant not guilty, the Defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the Defendant may be tried again for the aggravated offense, or he may be reindicted for an

offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law, however the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2).

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the Defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence Defendant to death or to life imprisonment without parole. In the hearing evidence may be presented as to any matter that the court deems relevant

to sentence, and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the Defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama. The State and the Defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3).

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Not withstanding the fixing of the punishment at death by the jury, the court after weighing the aggravating and mitigating circumstances may refuse to accept the death penalty as fixed by the jury and sentence the Defendant to life imprisonment without parole, which shall be served without parole; or the court after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the Defendant to death. If the court imposes a sentence of death, it shall set forth in writing as the basis for the sentence of death, findings of fact from the trial and the sentence hearing which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death, and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4).

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5).

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The Defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6).

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The Defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disburbance;

(3) The victim was a participant in the Defendant's conduct or consented to the act;

(4) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The Defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the Defendant at the time of the crime. (Acts 1975, No. 213, § 7).

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this act who is not able to afford legal coun-

sel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8).

§ 13-11-9. Effective date.

This article shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10).

APPENDIX D

EXCERPT FROM THE STATE'S BRIEF
IN THE SUPREME COURT OF ALABAMA

STATEMENT OF THE FACTS

I.

THE STATE'S EVIDENCE

A.

FACTS SHOWN BY NON-ACCOMPLICE EVIDENCE

For Warran "Bookie" Green his birthday, December 1, 1977, was the last day of his life. The day before his wife, Lois Green, and their daughter had purchased a yellow-gold Seiko digital watch from Wilson's Jeweler's in Mobile, Alabama, at a cost of $195.00, to present to Mr. Green on his birthday. On the way home they stopped by the home of Mr. Green's brother, Dr. Rodgers Green, and showed him the watch. (R. pp. 114 and 226-234)

Thus, Mr. Green was wearing his birthday watch early the next morning when he got together with William

Etheridge. Mr. and Mrs. Green owned and operated the Western Auto Store in Mt. Vernon, Mobile County, Alabama. Some time earlier the Greens had sold Mr. Etheridge a freezer. However, the compressor on the freezer had failed, and, while it was being repaired, the Greens were going to lend Mr. Etheridge a freezer. Mr. Etheridge went to the Western Auto Store between eight and nine o'clock in the morning on December 1, 1977. He and Mr. Green then drove to the Green's home and picked up the loaner freezer and delivered it to Mr. Etheridge's house. Mr. Green then went back to the store, leaving his appliance dolly with Mr. Etheridge so that the latter could load his broken freezer on the repair truck. (R. pp. 113-123, 126-128 and 143)

By about ten-thirty that same morning Mr. Green was in the Mt. Vernon

Branch of the First National Bank of Mobile. He made a deposit and cashed checks receiving about $900.00 in cash in a red zipper bag. At this time Mr. Green was wearing his birthday watch and showed it to his first cousin, Linda Robbins, who worked in the Bank. (R. pp. 106-108 and 110-112)

It must have been after eleven when Mr. Green got back to his store. A short time later Willie Turner an employee of the store left to eat lunch at his mother-in-law's house. When Mr. Turner left, the Greens were alone in the store and Mr. Green was wearing his new watch. (R. pp. 140-141)

Some time between 11:45 a.m. and 12:00 noon Mr. Etheridge came to the Western Auto Store to return Mr. Green's dolly. With Mr. Etheridge were his wife, Pamela, a registered nurse, and their children. While Mr. Etheridge went in-

side with the dolly, Mrs. Etheridge stayed outside with the children. Arriving at about this same time were two Black men, identified as Charlie Ridgeway and Fred Motten. Mr. Etheridge took the dolly inside and leaned it against the counter, but the Greens did not appear to be present. He went back outside and told his wife that the Greens weren't there. She pointed out that they would hardly have left the store unlocked and that they were probably in the back. Mr. Etheridge went back inside the store and called for his friends. As he went back through the store he passed the Timex watch display and observed an empty watch case on the floor. As he put the case back on the display, Mr. Etheridge made a mental note that the Greens appeared to have sold a lot of watches that morning. (R. pp. 115-119 and 125)

Mr. Etheridge found his friends, Warren Green and Lois Green in a back room of the store. Their hands were tied behind their backs and they were tied together back-to-back by an electric extension cord. They were lying on their sides in a huge pool of blood; both were still alive. Mr. Green called to his wife to telephone for help and went back to do what he could for his dying friends. Then, Mr. Etheridge realized that his wife, a registered nurse, would be of greater use to the victims than he. He took over the telephone duties, and Mrs. Etheridge ministered to the Greens. She was joined by Mr. Ridgeway and Mr. Motten. After he had called the rescue squad and the police, Mr. Etheridge joined his wife and the other men. Even as the four ministered to them, Mr. Green died. In cutting the cord that bound his hands and feeling for his pulse, it was

observed that Mr. Green was no longer wearing his new watch. Mrs. Green was removed to a hospital where she died. (R. pp. 119-123, 126 and 127-135)

Investigation at the scene revealed that the cash register had been emptied, a television set and a stereo had been stolen along with several watches. Neither the red zipper bag nor the $900.00 it contained were found. (R. pp. 136-140, 142-154 and 157-160)

Autopsies were performed on the bodies of Mr. and Mrs. Green on December 2, 1977. The cause of death in each case proved to be a gun shot wound. Lois Green died of a gun shot wound inflicted behind the right ear, the bullet exiting in front of the left ear. Warren Green died of a gun shot wound inflicted in the back of his head, the bullet lodging above the left eye. There was on the face of Mr. Green an abrasion wound such

as would result from being struck by a gun butt or a shoe. (R. pp. 142-153 and 254-256)

On that same day, December 2, 1977, the Appellant was telling his girl friend, Doris Lacey Lambert, that he had killed two people at the Western Auto Store in Mt. Vernon, Alabama. The Appellant told Ms. Lambert that he was with Rodger[3] and Gill Man[4] and Percy Craig. (R. pp. 64-171)

On January 16, 1978, Mr. Green's birthday watch was pawned at Buster's Eagle Pawn Shop located at 224 Dauphin Street in Mobile by one Joe N. Beckham. (R. pp. 226-221, and 230-238)

On July 28, 1978, the Appellant was arrested at the apartment of Hazel Craig in Mobile. The arrest was made in the

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[3]"Rodger" is Rodger McQueen. (R. pp. 178-198)

[4]"Gill Mann" alias Reginald Tinsley (R. p. 209)

pre-dawn hours of the day. As soon as it was light enough to see, a search was made of the grounds of the apartment complex. On the ground behind the apartment where the Appellant was arrested was discovered a thirty-eight pistol, identified as State's Exhibit 11. (R. pp. 256-263)

The markings on the two thirty-eight caliber bullets which took the lives of Lois and Warren Green were consistent with their having been fired by State's Exhibit 11. (R. pp. 240-249)

After his arrest the Appellant was advised of his Constitutional rights and acknowledged understanding them. Deputy Willie Edward Estes of the Mobile Sheriff's office after advising the Appellant of his Constitutional rights, also told the Appellant that he thought he knew how the robbery-killing had occurred and that he, Deputy Estes, thought that he could put the Appellant inside the Western Auto

Store at the time of the robbery. To this the Appellant replied: "I don't doubt it." (R. pp. 276-281)

B.

THE TESTIMONY OF RODGER McQUEEN

Rodger McQueen was ruled to be an accomplice of the Appellant by the learned Trial Judge. McQueen testified to the following facts:

He, the Appellant, Percy Craig and Reginald Tinsley (alias Gill Man) got together on December 1, 1979, to travel to Jackson, Alabama, to commit some robberies. They were in Craig's blue 1976 Cadillac automobile. There was a torn place in the upholstery, and they stopped at the Western Auto Store in Mt. Vernon, Alaama, to get some tape to cover the spot. McQueen went inside to get the tape but came back out, because he didn't

have enough money for it. When he went back in, the Appellant and Tinsley followed him, both were armed. The Appellant and Tinsley forced the Greens into the back room and tied them up. McQueen could hear the couple begging for their lives. McQueen cleaned out the cash register and took the red zipper bag; Tinsley took a number of watches. The Appellant, after tying up Mr. and Mrs. Green, put a television set and stereo in Craig's automobile. The Appellant then made a third trip into the store with Tinsley. By this time, McQueen was back in Craig's car; Craid had never left the car. The Appellant and Tinsley came out of the store and got in the car. At this time the Appellant had Mr. Green's new watch. Craig asked if they had taken care of everything.[5] To this the Appel-

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[5]In Craig's behalf it must be pointed out that he admitted asking this question but said that he meant, were the people well tied. (R. p. 214)

lant replied that he had killed Mr. and Mrs. Green. The four then went to Craig's sister's house and divided the proceeds of their crime. (R. pp. 178-198)

C.

PERCY CRAIG'S TESTIMONY

The learned trial judge correctly held that the question of Craig's accomplice status was for the jury.

Craig's testimony was substantially identical to McQueen's above and need not be detailed here. (R. pp. 208-219)

Three points added by Craig were:

1. The time of the robbery was about noon. (R. p. 209)

2. Mr. Green's watch was pawned at a pawn shop in Dauphin Street in Mobile. The Appellant arranged with one Joe Nathan Beckham to actually pawn the watch. Craig drove the Appellant and Beckham to the shop. (R. pp. 218-219)

3. The red zipper bag was burned in his mother's back yard. (R. pp. 216)

II.

THE DEFENSE

The defense was alibi. A witness, one Carl Harrington, testified that on December 1, 1977, he was a student at Bishop State Junior College. On that date classes at the college were cancelled after ten o'clock in the morning[6] for an assembly. Harrington testified that he cut the assembly and went to the Ebony Club instead. He arrived at the club at ten thirty a.m. and met the Appellant outside. He stayed with the Appellant at the club for about forty-five minutes or until about eleven fifteen a.m. (R. pp. 295-309)

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[6]This was important because it established the time when Harrington was allegedly with the Appellant.

III.

THE STATE'S REBUTTAL

In rebuttal the State proved that no classes and no assembly were held at Bishop State on December 1, 1977. In addition, Carl Harrington was not a student at the school on that date. (R. pp. 309-312)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this 7th day of January, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for Freddie Lee Wright, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Al Pennington
Attorney at Law
602 Church Street
Mobile, Alabama, 36602

/s/
JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

Opposition

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 81-1287

STATE OF ALABAMA,
Petitioner

versus

FREDDIE LEE WRIGHT,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

VADER ALDRIDGE PENNINGTON

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO.

STATE OF ALABAMA,
Petitioner,

v.

FREDDIE LEE WRIGHT,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

Respondent, Freddie Lee Wright (Wright), respectfully offers this response to the State of Alabama's (State) Petition for Writ of Certiorari heretofore docketed on January 11, 1982.

QUESTIONS PRESENTED FOR REVIEW

I. Does the decision of this Honorable Court in Beck v. Alabama, 447 U.S. 625 (1980) require the automatic retrial on all cases tried under the Alabama Capital Punishment Statute?[1]

II. In capital cases is a procedure which creates a substantial possibility of arbitrary and capricious verdicts contrary to the evidence constitutionally acceptable where there are alternative procedures available to avoid such possibilities?

PARTIES TO THE PROCEEDING

In the Circuit Court of Mobile County, Alabama, Court of Criminal Appeals and the Supreme Court of Alabama, the parties were the State of Alabama, Petitioner, herein and Freddie Lee Wright, Respondent, herein.

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[1]Title 13, Sec. 13-11-1 through 13-11-9, Code of Ala., (1975).

OPINIONS BELOW

The opinion or order of the Court of Criminal Appeals of Alabama is not as yet reported but will be reported as:

Wright v. State (Cr. App. Ala., 1981) ____So. 2d____.

The said opinion was submitted by the State as Appendix "A" and is adopted by Wright.

The opinions and orders of the Supreme Court of Alabama are not as yet reported, but will be reported as:

Ex parte: State, In Re: Wright v. State (S. Ct. Ala., 1981) ____So. 2d_____.

The said opinion was submitted by the State as Appendix "B" and is adopted by Wright.

JURISDICTION

This Honorable Court has acknowledged and taken jurisdiction by virtue of its docketing order of January 11, 1982, pursuant to 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "... All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...."

STATUTORY PROVISIONS INVOLVED

Code of Alabama, 1975, Title 13, Sections 13-11-1 through 13-11-9, the same being made a part of State's Appendix "C" said Appendix, in this aspect, being adopted by Wright.

STATEMENT OF THE CASE

Wright agrees that some background is necessary to understand the matter which the State seeks to have reviewed and will, for the

sake of continuity, try to follow as closely as possible the State's format.

I.

BACKGROUND

Wright would agree with the general premise set out by the State herein, and while Wright cannot speak from personal knowledge as to the reversal of all cases, does concede the rationale set out by the Appellate Courts in Alabama for the purposes of reversal was Beck v. Alabama, supra.

II.

THE INSTANT CASE

Freddie Lee Wright was tried twice, once in April, 1979, and once in May, 1979, for the former ending in a hung jury, and the latter in a conviction in death sentence. These trials took place in Mobile County Circuit Court and were based on a two-count indictment with one count alleging robbery wherein one or more persons is intentionally killed[2] and the second count alleging murder in the first degree of two or more persons.[3] The plea was not guilty. (R. 1-3)

Prior to trial Freddie Lee Wright through counsel filed a motion to quash the indictment based on unconstitutionality of the statute in question and raised as one of several grounds the fact that neither the trial court or the jury could consider lesser included offenses (R. 11-15). This motion was overruled by the trial court and subsequently was one allegation of error raised on the appeal of Wright's case. Wright, in his brief to the Court of Criminal Appeals, pointed out that the trial court was not allowed to review the evidence in light of whether or not lesser included offenses might exist and thereby made the sentence of death mandatory in violation of the principals enunciated by this Honorable Court.[4]

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[2]Title 13, Sec. 13-11-2 (a) (2), Code of Ala.,1975 (Appendix "C")

[3]Title 13, Sec. 13-11-2 (a) (10), Code of Ala., 1975 (Appendix "C")

[4]Woodson v. North Carolina, 428 U.S. 280 (1976)
NOTE: the case at bar was briefed and argued before the Alabama Court of Criminal Appeals prior to Beck, supra.

On August 4, 1981, Court of Criminal Appeals of Alabama reversed Wright v. State based on the authority of Beck v. Alabama, supra. This reversal was subsequently upheld by the Supreme Court of Alabama on December 11, 1981.

STATEMENT OF THE FACTS

Respondent, Wright, would generally adopt the statement of the facts which are set out in the State of Alabama but would point out the following factors not set out in State's statement of the facts:

1. The other three defendants in the above case were all indicted for MURDER, FIRST DEGREE rather than Capital Murder despite the fact that al least Roger McQueen and Percy Craig admitted in open court the participation of the robbery and murder.

2. Percy Craig admitted having perjured himself on at least one prior occasion as to the facts and testimony given against Freddie Wright.

3. Co-defendants, Percy Craig and Roger McQueen, were both convicted of Murder, Second Degree. Percy Craig was sentenced to 10 years in the penitentiary and Roger McQueen was sentenced to 20 years in the penitentiary -- both substantially different than that sentence received by Freddie Lee Wright.

SUMMARY OF THE ARGUMENT

1. The Supreme Court and Court of Criminal Appeals of Alabama have held that this case must be re-tried under the authority of Beck v. Alabama, supra. This retrial is required because it is the trial court which makes the determination as to the sufficiency of the evidence at the close of the case as to whether or not a charge on lesser included offenses is required. In the instant case, that consideration did not take place, because the trial court was prohibited by statute from evaluating the evidence in that light. The State of Alabama now asks this Court or the Alabama Appellate Courts to dictate what the trial court should have done, without hearing any of the evidence. Essentially the State asks that this Court review as though the trial court had made the determinations to not charge on the lesser included offenses, by merely reviewing the record. Therefore the

opinion of the Alabama Appellate Court is perfectly consistent with the findings of this Honorable Court in Beck v. Alabama, supra.

2. Not remanding this cause for an entirely new trial flies in the face of the opinion of this Court in Furman v. Georgia, 408 U.S. 238, (1972) and Roberts v. Louisiana, 428 U.S. 325, (1976). In both of those cases, this Court stated that an arbitrary and capricious verdict was the single thing that had to be guarded against in capital cases. When, in a case such as this, the trial court is completely precluded from using its' descretion in determining whether or not a charge on a lesser included offense is proper then the trial court is being asked to condone a mandatory sentence. Remandment for further sentencing under this same arbitrary verdict earlier reached could only, at best, reduce the Respondent's sentence to life without parole which in a situation such as this is nothing more than another name for capital punishment.

As can be seen, the State's Appellate Courts decisions are perfectly consistent with Furman, supra and Roberts, supra and Beck supra.

ARGUMENT

I.

THIS COURT'S DECISION IN BECK MANDATES THE REVERSAL OF WRIGHT VS. STATE.

State of Alabama insists that each case be examined on its' own merit. It also appears to desire to lump every case into one category and that is a series of cases that should not be reversed for any reason. Wright cannot presume to have the vast wealth of knowledge as the State has as to each and every capital case that has been tried and appealed and would ask the Court to review based on the facts of Wright's case itself.

In Beck v. Alabama 447 U.S. 625, (1980), this Honorable Court considered the conviction and death sentence of a convict convicted and sentenced under a statute forbidding the consideration of lesser included offenses. And this Honorable Court set out for question

to be answered as follows:

> "May a sentence of death constitutionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of a lesser included non-capital offense, and when the evidence would have supported such a verdict? 444 U.S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204

> "We hold now that the death penalty may not be imposed under these circumstances...." (447 U.S. 625, 627, 65 L. Ed. 2d 392, 396).

It was made clear here that this Honorable Court expected the trial court to consider the evidence presented to it and determine whether or not a charge on lesser included offenses was appropriate.

The State in its' brief points out how lesser included offenses would be improper in Ritter v. State, 403 So.2d 154, and Evans v. Britton, 639 F.2d. 221 since John Evans and Wayne Ritter freely admitted their participation of the murder of Edward Nasser and in fact while on the witness stand, begged, if not dared, the jury to give them the death penalty. Having had firsthand knowledge of Mr. Evans and Ritters situation, counsel for Wright would point out that the cases involving Mr. Evans and Mr. Ritter and the case involving Mr. Wright are at separate ends of the spectrum and should not be considered in the light of each other.

The State is basing a great deal of its' argument concerning the retrial of all the cases, based on how the question of the severance of the preclusion clause should not be considered in cases involving Mr. Evans and Mr. Ritter.

The State then says if the preclusion clause had never existed it wouldn't make any difference because you either had to find Mr. Wright guilty of capital murder or find him not guilty. This is a preposterous position for the State to take in the light of the fact that three co-defendants who freely admitted their participation(having confessed not only to the police but at least two of them in open court)were all indicted for murder in the first degree, despite the fact that the Alabama law requires that all co-conspirators be treated as principals (see Court's charge R. 349, 350). The State must concede that murder in the first degree was an included offense herein.

It is clear that, even though Mr. Wright's defense was alibi, that to say in Mr. Wright's case that no consideration of lesser included offenses is available, would have the effect to saying that its alright for the State through its Attorney General or District Attorneys to arbitrarily decide who will have the benefit of lesser included offenses and who will not and then tell the trial courts that even though your job is to listen to the evidence and make your determinations, we're not going to allow you to do that.

Thus, it is all the more amazing that the State of Alabama would suggest in the case at bar that the trial court should not be allowed to consider the evidence in light of lesser included offenses and whether or not those lesser included offenses are applicable.

At least in the case at bar, the Court of Criminal Appeals and the Supreme Court of Alabama, in ruling that the case should be reversed based on Beck v. Alabama, supra, is consistent with the holdings of this Honorable Court.

II.

NOT REMANDING THIS CASE FOR AN ENTIRELY NEW TRIAL FLIES IN THE FACE OF THE OPINION OF THIS COURT FURMAN V. GEORGIA

In Furman v. Georgia,408 U.S. 238 (1972), this Honorable Court struck down statutory death penalties that allowed the unbridled jury to determine when the death penalty would be imposed without some guidelines being given to the juries as to when they might impose the death penalty. This philosophy was reaffirmed in Woodson v. North Carolina, supra and Roberts v. Louisiana, supra when the Court struck down a mandatory death scheme and a scheme whereby the jury was required to consider a lesser included offenses regardless of the evidence.

Such would not be the case in Alabama under the Alabama Supreme Courts interpretation of Beck. Under the Alabama Supreme Courts' ruling the trial court would be required to review the evidence

at the close of the case and determine at that time whether or not a charge on a lesser included offenses was appropriate under the particular fact situation. This aspect of the decision-making process would thereby remove the arbitrary and capricious imposition of sentences in that the trial court would have control over the case in such a manner that the guidelines as to lesser included offenses would be given only in those cases when the evidence justified said guidelines. Thereby, the Alabama Supreme Court has established a mechanism for controlling the improprieties feared by the Honorable Court in Furman, Roberts, and Woodson.

The State would have this Honorable Court say that there is a mechanism available to cure the problem of the preclusion clause and that is the Defendant could be re-sentenced under the old statute if the Court thought it appropriate. That proposal does not take into consideration lesser included offenses rather it gives the State a chance to say "we are not going to execute anybody" while in fact they are sentencing someone to spend the rest of their life in the penitentiary without possibility of parole and still forbid the trial court or jury to consider lesser included offenses.

The State also does not point out, and it is important to note, that in the particular case in question, that is State v. Wright, the trial judge is retired and no longer on the bench. Therefore, he would not be available to the State or the defense for such a review as proposed by the State. Further, it would be even more damaging to expect a trial judge who did not see and hear the witnesses to review the record and make a determination as to whether or not the preclusion clause would have or did affect another trial judge in the decision-making process.

The case at bar is one that requires a reversal because none of the claimed protections are available to Freddie Lee Wright, and To reverse this case is not to "rubber-stamp any reversal." Rather, it is to say to the State of Alabama and to the trial courts, you must look at the evidence at the close of the case and determine

whether or not there is evidence of a lesser included offense, and if so, charge on it, if not then don't charge on it.

To accept the State's proposal would defeat the purpose of having trial courts and judges. The Alabama Appellate Courts, in reversing the conviction of Freddie Lee Wright upon the basis of Beck v. Alabama, supra, did the right thing for the right reason.

CONCLUSION

In conclusion, the Respondent, Freddie Lee Wright, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case directly comply with and meet the standards set out in the prior decisions of this Honorable Court. For that reason the Respondent prays that this Honorable Court will upon issuance of the Writ of Certiorari review the decisions the Honorable Court of Criminal Appeals and the Supreme Court of Alabama and upon such review will affirm the decisions of said Courts granting a new trial to the Respondent.

VADER ALDRIDGE PENNINGTON

DANIEL L. McCLEAVE

Attorney's for Respondent

PENNINGTON, McCLEAVE AND PATTERSON
602 Church Street
Mobile, AL 36602

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of May, 1982, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed and first class postage prepaid.

BY: _____

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
MAY 17 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM 1982

NO. 81-1287

STATE OF ALABAMA,
PETITIONER

v.

FREDDIE LEE WRIGHT,
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent, Freddie Lee Wright, by and through his attorney, Vader Aldridge Pennington, and moves this Honorable Court for leave to file the attached Response to the Petition for Writ of Certiorari to the Supreme Court and Court of Criminal Appeals of Alabama without being subject to payment of costs and to proceed in forma pauperis pursuant to Rule 46, Rules of the Supreme Court of the United States.

The affidavit of counsel for Petitioner in support of this motion is attached hereto.

Respectfully submitted,

VADER ALDRIDGE PENNINGTON
Attorney for Respondent

PENNINGTON, McCLEAVE AND PATTERSON
602 Church Street
Mobile, AL 36602

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO.

STATE OF ALABAMA,
PETITIONER

v.

FREDDIE LEE WRIGHT,
RESPONDENT

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, Vader Aldridge Pennington, counsel of record for Respondent, Freddie Lee Wright, being first duly sworn, do depose and say:

1. I am the attorney of record for the Respondent, Freddie Lee Wright.

2. I was originally appointed to represent the Respondent by the Mobile County Circuit Court in September 1978.

3. Subsequently, I was retained for trial by a member of Respondent's family.

4. Two trials were held in April and May of 1979, the second resulting in Respondent's conviction and subsequent sentence of death said sentence taking place July 2, 1979.

5. Respondent was at that time determined to be indigent and I was appointed as counsel for purposes of appeal and so remain as appointed counsel.

6. Respondent has been in jail either in Mobile, Alabama, at the Mobile County Jail or in Atmore, Alabama, at Holman Prison since August 1978.

7. Respondent has not and does not now have any independent source of income and is at this time indigent.

8. Respondent is not allowed to make an appeal bond while under a sentence of death.

VADER ALDRIDGE PENNINGTON

STATE OF ALABAMA)

COUNTY OF MOBILE)

Before me, the undersigned authority, personally appeared Vader Aldridge Pennington, who being first duly sworn, stated under oath that he had read the foregoing Affidavit, that he has personal knowledge of the facts stated therein, and that the facts stated therein are true and correct.

Subscribed and sworn to before me on this 13th day of May, 1982.

June M Marent
NOTARY PUBLIC My Commision Expires 4-27-86